

1 STEFANI E. SHANBERG (State Bar No. 206717)
2 ROBIN L. BREWER (State Bar No. 253686)
3 EUGENE MARDER (State Bar No. 275762)
4 WILSON SONSINI GOODRICH & ROSATI
5 Professional Corporation
6 One Market Plaza
7 Spear Tower, Suite 3300
8 San Francisco, California 94105
9 Telephone: (415) 947-2000
10 Facsimile: (415) 947-2099
11 E-Mail: sshanberg@wsgr.com
12 rbrewer@wsgr.com
13 emarder@wsgr.com

14 RYAN R. SMITH (State Bar No. 229323)
15 ROBERT R. CLEARY, JR. (State Bar No. 282113)
16 WILSON SONSINI GOODRICH & ROSATI
17 Professional Corporation
18 650 Page Mill Road
19 Palo Alto, California 94304
20 Telephone: (650) 493-9300
21 Facsimile: (650) 493-6811
22 E-Mail: rsmith@wsgr.com
23 rcleary@wsgr.com

24 Attorneys for Defendant
25 SYMANTEC CORPORATION

26 EDWARD R. REINES (State Bar No. 135960)
27 SONAL N. MEHTA (State Bar No. 222086)
28 BYRON C. BEEBE (State Bar No. 235179)
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, California 94065
Telephone: (650) 802-3000
Facsimile: (650) 802-3100
E-Mail: edward.reines@weil.com
sonal.mehta@weil.com
byron.beebe@weil.com

29 Attorneys for Defendant
30 ADOBE SYSTEMS INCORPORATED

31 ERIC A. BURESH (*Pro Hac Vice*)
32 MICHELLE L. MARRIOTT (*Pro Hac Vice*)
33 MARK C. LANG (*Pro Hac Vice*)
34 ERISE IP, P.A.
35 6201 College Boulevard, Suite 300
36 Overland Park, Kansas 66211
37 Telephone: (913) 777-5600
38 Facsimile: (913) 777-5601
39 E-Mail: eric.buresh@eriseip.com
40 michelle.marriott@eriseip.com
41 mark.lang@eriseip.com

42 JULIE TURNER (State Bar No. 191146)
43 TURNER BOYD LLP
44 702 Marshall Street, Suite 640
45 Redwood City, California 94063
46 Telephone: (650) 521-5930
47 E-Mail: turner@turnerboyd.com

48 Attorneys for Defendant
49 UBISOFT, INC.

50 UNITED STATES DISTRICT COURT
51 NORTHERN DISTRICT OF CALIFORNIA
52 OAKLAND DIVISION

53 DIGITAL REG OF TEXAS, LLC,
54 Plaintiff,
55 v.
56 ADOBE SYSTEMS INC., et al.,
57 Defendants.

58 Case No. 4:12-cv-01971-CW

59 **DEFENDANTS' MOTION FOR
60 SUMMARY JUDGMENT AND
61 RESPONSIVE CLAIM
62 CONSTRUCTION BRIEF**

63 Date: May 15, 2014
64 Time: 2:00 p.m.
65 Place: Courtroom 2
66 Judge: Honorable Claudia Wilken

67 **REDACTED VERSION OF DOCUMENT**

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on May 15, 2014, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Claudia Wilken, located at Courtroom 2 of the United States Courthouse, 1301 Clay Street, Oakland, California 94612, Defendants will and hereby do move this Court for an order granting summary judgment of no infringement as to the Asserted Claims.

This motion is made pursuant to Federal Rule of Civil Procedure 56. This motion is based on this notice of motion and motion, the supporting memorandum of points and authorities, the accompanying declarations, filed concurrently herewith, including exhibits, and such additional evidence and arguments as may hereinafter be presented.

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DEFENDANTS' MOT. FOR SUMMARY J. &
RESPONSIVE CLAIM CONSTRUCTION BRIEF
Case No. 4:12-cv-01971-CW

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4	Declaration of Byron C. Beebe in Support of Adobe's Responsive Claim	Beebe Decl.
5	Construction Brief and Motions for Summary Judgment (Dkt. Nos. 520	
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6	Declaration of Mark C. Lang in Support of Ubisoft, Inc.'s Claim	Lang Decl.
7	Construction Brief and Motion for Summary Judgment of Non-	
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8	Adobe Systems, Inc.	Adobe
9	Symantec Corporation	Symantec
10	Ubisoft Entertainment, Inc.	Ubisoft
11	Digital Reg of Texas, LLC	Digital Reg
12	U.S. Patent No. 6,389,541	'541 patent
13	U.S. Patent No. 6,751,670	'670 patent
14	U.S. Patent No. 7,673,059	'059 patent
15	U.S. Patent No. 7,127,515	'515 patent
16	U.S. Patent No. 7,272,655	'655 patent
17	U.S. Patent No. 7,562,150	'150 patent
18	U.S. Patent No. 7,421,741	'741 patent
19	Claims 1, 2, 4, and 13 of the '541 patent as to Adobe	Asserted Claims ¹
	Claims 1, 7, and 12 of the '741 patent as to Adobe	
	Claims 32, 45, and 52 of the '670 patent as to Adobe	
	Claims 32 and 45 of the '670 patent as to Symantec and Ubisoft	
	Claims 16, 17, and 19, of the '059 patent as to Symantec and Ubisoft	
	Claims 1, 5, and 16 of the '655 patent as to Ubisoft	
	Claims 1 and 2 of the '150 patent as to Ubisoft	
22	content delivery network	CDN
23	U.S. Patent No. 5,509,070	Schull

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¹ Digital Reg is not asserting the doctrine of equivalence.

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SUMMARY OF ACCUSED PRODUCTS

Patent	Claims	Products
Adobe		
U.S. Patent No. 6,389,541	1, 2, 4 and 13	Adobe Flash Platform Adobe LiveCycle Adobe Software Delivery, Licensing, and Activation
U.S. Patent No. 7,421,741	1, 7, and 12	Adobe Flash Platform Adobe Digital Publishing Tools
U.S. Patent No. 6,751,670	32, 45, and 52	Adobe Flash Platform (Claim 32) Adobe Digital Publishing Tools (Claims 45 and 52) Adobe LiveCycle Adobe Software Delivery, Licensing, and Activation (Claims 32 and 45)
Symantec		
U.S. Patent No. 6,751,670	32 and 45	Symantec CLT Products
U.S. Patent No. 7,673,059	16, 17, and 19	
Ubisoft		
U.S. Patent No. 6,751,670	32 and 45	UPlay (client software and server-side components)
U.S. Patent No. 7,673,059	16, 17, and 19	
U.S. Patent No. 7,272,655	1, 5, and 16	
U.S. Patent No. 7,562,150	1 and 2	

SUMMARY OF GROUNDS FOR SUMMARY JUDGMENT – ADOBE

Summary Judgment Grounds	Claims
Digital Reg has failed to prove direct infringement on the asserted method claims. Digital Reg admits that Adobe could not perform each step of the asserted claims because each claim requires multiple actors. <i>See Section IV.A.</i>	All Asserted Claims ¹ for direct infringement.
Digital Reg cannot prove indirect infringement because it has not provided evidence of the requisite underlying direct infringement and has no evidence of specific intent to cause infringement. <i>See Section IV.C.</i>	All Asserted Claims for indirect infringement.
Adobe is entitled to summary judgment of noninfringement based upon the agreed upon construction of “executing an installation process that generates at the client a permission that is locked uniquely to the client and that may be found by a later execution of the access checking process.” <i>See Section VI.A.</i>	All claims of the ’541 patent
Adobe is entitled to summary judgment of noninfringement based upon Adobe’s construction of “token.” <i>See Section VI.B.</i>	All claims of the ’541 patent
Adobe is entitled to partial summary judgment because all products are licensed when used in a Windows environment pursuant to an agreement between Digital Reg and Microsoft. <i>See Section VI.D.</i>	All claims of the ’541 patent
Adobe is entitled to summary judgment of noninfringement or, in the alternative, invalidity based upon irreconcilable positions taken by Digital Reg’s experts on the term “container identifier.” <i>See Section VII.A.</i>	All claims of the ’741 patent
Adobe is entitled to summary judgment of noninfringement based upon Adobe’s construction of “encrypting a header.” <i>See Section VII.B.</i>	All claims of the ’741 patent
Adobe is entitled to summary judgment of noninfringement based upon Adobe’s construction of “re-keying the header.” <i>See Section VII.C.</i>	All claims of the ’741 patent
Adobe is entitled to summary judgment of noninfringement based upon the limitation “based on the result of the attempted transmission.” <i>See Section VIII.A.</i>	All claims of the ’670 patent
Adobe is entitled to partial summary judgment of noninfringement based upon irreconcilable positions by Digital Reg’s experts on “notification information.” <i>See Section VIII.C.</i>	All claims of the ’670 patent

¹ Claim 7 of the '741 patent is a Beauregard claim. Infringement requires proof that a single product performs the claimed method, which Digital Reg admits does not occur. Beebe Decl. Ex. 13 at 676:4-20. Claim 12 of the '741 patent is dependent upon claim 10, which was not asserted and was not analyzed by Digital Reg. Digital Reg has failed to provide evidence of direct infringement of this claim as well.

SUMMARY OF GROUNDS FOR SUMMARY JUDGMENT – SYMANTEC

Summary Judgment Grounds	Claims
Digital Reg has failed to prove direct infringement on the asserted method claims. Digital Reg admits that Symantec could not perform each step of the asserted claims because each claim requires multiple actors. <i>See Section IV.A.</i>	All Asserted Claims for direct infringement.
Digital Reg cannot prove indirect infringement because it has not provided evidence of the requisite underlying direct infringement, has not demonstrated the accused products have no substantial noninfringing use, and has no evidence of specific intent to cause infringement. <i>See Section IV.C.</i>	All Asserted Claims for indirect infringement.
Symantec is entitled to summary judgment because the Symantec CLT Products do not deny access to the electronic content until notification information is transmitted, as required by each asserted independent claim. <i>See Section VIII.D.</i>	Case dispositive.
Symantec is entitled to summary judgment of noninfringement based upon Defendants' construction of "successive recipient" or "successive computer." <i>See Section VIII.F.</i>	Case dispositive.
Symantec is entitled to summary judgment of noninfringement based upon the limitation "based on the result of the attempted transmission." <i>See Section VIII.A.</i>	All claims of the '670 patent.
The Court struck Digital Reg's expert report on the asserted independent claim for the accused products. (Dkt. No. 509.) Under case law, Digital Reg must offer expert opinion of infringement to overcome expert testimony of noninfringement. Digital Reg cannot meet its burden and summary judgment is appropriate. <i>See Section III.A.</i>	All claims of the '059 patent.

SUMMARY OF GROUNDS FOR SUMMARY JUDGMENT – UBISOFT

Summary Judgment Grounds	Claims
Digital Reg has asserted only method claims, which requires that each step of the claim be performed within the United States. Digital Reg accuses Ubisoft of infringing based upon performance of steps that undisputedly occur outside of the United States. Digital Reg's allegations fails as a matter of law. <i>See Section IV.B.</i>	Case dispositive.
Digital Reg's expert, Dr. Devanbu, has offered no evidence of infringement by Ubisoft. Dr. Devanbu's expert report consists of conclusory statements without factual support or investigation. This is not evidence of infringement and summary judgment is appropriate. <i>See Section IV.C.</i>	Case dispositive.
Digital Reg has failed to prove direct infringement on the asserted method claims. Digital Reg admits that Ubisoft could not perform each step of the asserted claims because each claim requires multiple actors. <i>See Section IV.A.</i>	All Asserted Claims for direct infringement.
Digital Reg cannot prove indirect infringement because it has not provided evidence of the requisite underlying direct infringement and has no evidence of specific intent to cause infringement. <i>See Section IV.C.</i>	All Asserted Claims for indirect infringement.
Ubisoft is entitled to summary judgment for all products downloaded using the Steam Platform based upon an agreement between Digital Reg and Valve. <i>See Section X.</i>	Sales of Ubisoft's games made by Valve.
Ubisoft is entitled to summary judgment of noninfringement based upon the limitation "based on the result of the attempted transmission." <i>See Section VIII.A.</i>	All claims of the '670 patent.
Ubisoft is entitled to summary judgment of noninfringement based upon Defendants' construction of "successive recipient" or "successive computer." <i>See Section VIII.F.</i>	All claims of the '670 and '059 patents.
Ubisoft is entitled to summary judgment of noninfringement because access is not granted "upon transmission" of an authorized user identifier. <i>See Section VIII.G.</i>	All claims of the '059 patent.
Ubisoft is entitled to summary judgment of noninfringement based upon Ubisoft's construction of "based on the results of the attempt to transmit." <i>See Section IX.A</i>	All claims of the '655 and '150 patents.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Digital Reg has the burden of proving infringement, but has fallen short of meeting this burden on a number of grounds. Digital Reg has also continued to maintain allegations that fail as a matter of law.

6 For example, Digital Reg is asserting only method claims against Ubisoft, requiring Digital
7 Reg to show that each step of the claim is performed in the United States. It is undisputed,
8 however, that the accused functionality is largely and, in some instances, exclusively, performed
9 outside of the United States. Digital Reg cannot show infringement by Ubisoft as a matter of law.
10 As another example, Digital Reg continues to assert direct infringement of method claims even
11 after its infringement expert expressly conceded that, even under Digital Reg's own infringement
12 theory, Defendants do not practice the requires steps of the asserted claims. And Digital Reg
13 asserts indirect infringement without even a *prima facie* showing, let alone evidence sufficient to
14 create a factual dispute, of an underlying direct infringement or as to inducement or intent.
15 Likewise, the Court struck Digital Reg's expert report for the independent claim of the '059 patent
16 as to Symantec, yet Digital Reg improperly maintains its allegations on this patent. And Digital
17 Reg alleges infringement as to licensed products for which infringement is foreclosed by the
18 doctrine of patent exhaustion, including Adobe products licensed to at least the '541 patent under
19 the Digital Reg/Microsoft license and the approximately 90% of Ubisoft's accused products that
20 are downloaded through the Stream Platform and licensed under the Digital Reg/Valve license.

21 Digital Reg has also taken unsupportable claim construction positions where a proper
22 construction entitles Defendants to summary judgment. Digital Reg consistently disregards the
23 plain meaning of the terms, the patent specifications, and clear disclaimers made during
24 prosecution of the patents to overcome prior art. Instead, Digital Reg advance litigation driven
25 claim constructions and, in an attempt to maintain its infringement theory while also attempting to
26 distinguish prior art cited by Defendants, has offered inconsistent and irreconcilable interpretations
27 of certain claims for infringement and invalidity.

28 Accordingly, summary judgment is warranted as to each defendant on multiple grounds.

1 **II. FACTUAL BACKGROUND**

2 Digital Reg is a non-practicing patent assertion entity based in the Eastern District of
3 Texas. Digital Reg did not develop the technology claimed in the asserted patents. Rather, Digital
4 Reg purchased the patents out of bankruptcy and now seeks a windfall thousands of times greater
5 than what it paid for the patents. A table of the accused products and claims broken down by
6 Defendant is on page viii.

7 **A. Adobe Accused Products**

8 Digital Reg has asserted claims against multiple, unrelated Adobe products, which Digital
9 Reg has identified as Adobe's Flash Platform, Digital Publishing Tools, and LiveCycle products,
10 as well as Adobe's Software Delivery, Licensing, and Activation services. Adobe's expert,
11 Dr. Wicker, provided a description of these products. Beebe Decl. Ex. 8 at ¶¶ 23-46.

12 **B. Symantec Accused Products**

13 Digital Reg has accused Symantec's "CLT Products" of infringing the '670 and '059
14 patents. At a high-level, Symantec's CLT Products function as follows: An end-user may freely
15 download, install, and use Norton software from various third-party websites. Smith Decl. Ex. 3
16 at 25:21-26:4. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 **C. Ubisoft Accused Products**

25 Uplay PC: [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 Ubishop and Uplay Express Shop: [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 Third-Party Channels: [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 **III. DIGITAL REG HAS NO EVIDENCE OF INFRINGEMENT.**

19 **A. Digital Reg Offered No Expert Opinion for the '059 Patent as to Symantec.**

20 Symantec is entitled to summary judgment of noninfringement of the '059 patent because
21 Digital Reg has no admissible expert opinion regarding Symantec's alleged infringement. The
22 Court granted Symantec's Motion to Strike portions of Dr. Devanbu's report related to claim 16 of
23 the '059 patent.¹ *See* Dkt. No. 509 at 2:10-18. In view of this order, Digital Reg has offered no
24 expert opinion regarding infringement of claim 16. Additionally, because asserted claims 17 and
25 19 of the '059 patent depend from claim 16, Digital Reg has not offered expert opinion of
26 infringement of these claims either. Symantec, on the other hand, has submitted the

27 _____
28 ¹ The Court also struck claim 25, but claim 25 is no longer asserted against Symantec. *See*
Election of Asserted Claims (Feb. 27, 2014).

1 noninfringement opinion of Dr. Stubblebine. Smith Decl. Ex. 9 ¶¶ 122-178. Accordingly, Digital
 2 Reg cannot meet its burden and summary judgment is appropriate.

3 **IV. DEFENDANTS DO NOT DIRECTLY INFRINGE THE ASSERTED CLAIMS.**

4 There are multiple threshold issues, which, should the court decide in Defendants' favor,
 5 could significantly reduce and potentially eliminate the need for claim construction. Summary
 6 judgment must be entered if there is no genuine issue as to any material fact and the moving party
 7 is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is
 8 appropriate in a patent case as in any other. *Desper Prods., Inc. v. QSound Labs., Inc.*, 157 F.3d
 9 1325, 1332 (Fed. Cir. 1998). The patentee—Digital Reg—bears the burden of proving
 10 infringement. *See Under Sea Indus. v. Dacor Corp.*, 833 F.2d 1551, 1557 (Fed. Cir. 1987).

11 **A. Defendants Do Not Perform Each Step of the Asserted Claims.**

12 The asserted claims against Symantec and the claims of the '541 and '670 patents and
 13 claim 1 of the '741 patent² asserted against Adobe are method claims, each with multiple steps.
 14 To prove that Symantec and Adobe directly infringe, Digital Reg must prove that each Defendant
 15 performs each step within the United States. *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d
 16 1282, 1318 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1157 (2006). Digital Reg cannot do so.

17 As admitted by Digital Reg's expert witness on infringement, there is no evidence that
 18 Symantec itself has performed any of the asserted claims. Smith Decl. Ex. 8 at 99:4-6. In fact,
 19 Digital Reg's technical expert conceded that Symantec **could not possibly** perform all the steps of
 20 any asserted claim. Smith Decl. Ex. 11 at 718:7-13 [REDACTED]

21 [REDACTED]

22 [REDACTED]; *see also id.* at 13:17-19, 204:11-20 (testifying that Symantec does not perform all of the steps of claim 32 of
 23 the '670 patent); *id.* at 219:7-10 (same regarding claim 45 of the '670 patent); *id.* at 234:22-24

25 ² Claim 7 of the '741 patent is a Beauregard claim. Infringement thus requires proof that a
 26 single product performs the claimed method. *See CLS Bank Int'l v. Alice Corp.*, 717 F.3d 1269,
 27 1287 (Fed. Cir. 2013). As with the method claims, Digital Reg's expert admits that no single
 28 software product practices the method claimed. Beebe Decl. Ex. 13 at 676:4-20 ("The practicing
 of this claim would require elements on the client side and the server side. So, to the extent that
 the client side and server side software are different, it requires different pieces of software.").

1 (same regarding claim 16 of the '059 patent).

2 Similarly, Digital Reg's infringement expert admits that Adobe does not practice each step
 3 of the asserted method claims and has cited no evidence supporting a direct infringement claim.
 4 Instead, Digital Reg's evidence is that infringement only occurs when steps are taken by an Adobe
 5 customer and/or unrelated third-party consumers. Beebe Decl. Ex. 13 at 665:3-7 ("Q. In the
 6 context of Flash, you'll agree with me that the '541 Claim 1 would require both a user at the client
 7 site as well as a content owner or distributor; right? A. Correct."); 665:8-14 (541 Software
 8 Delivery); 665:15-20 (541 LiveCycle); 667:20-668:10 ("Q Okay. So, with respect to the Adobe
 9 Flash platform, you're not contending that the claim limitations of Claim 32 of the '670 patent are
 10 practiced by Adobe; right? A. It's practiced by anybody who uses Adobe software. Q. It's
 11 practiced by the client side or the user, not Adobe? A. Yes. Q. And, with respect to Claim 45 of
 12 the '670 patent, your infringement theory is based on Adobe's customers or users, not on Adobe;
 13 right? A. If Adobe were a user, it will be practiced by Adobe. Q. But you don't have any
 14 evidence of that? A. No."); 669:1-4 (670 LiveCycle); 669:20-24 (670 Digital Publishing); 669:25-
 15 670 (670 Software Delivery):17; 675:8-12 (741 patent).

16 With respect to Ubisoft, at his deposition, Dr. Devanbu confirmed that method steps in
 17 each of the asserted claims are performed by third-party CDNs or web servers. *See, e.g.*, Lang
 18 Decl., Ex. 7 at 408:18-409:8, 375:3-15, 372:3-16, 372:17-373:21 (admitting "transmitting" and
 19 "receiving" steps of claim 16 of the '059 patent are performed by third parties); *id.* at 406:2-407:9,
 20 407:18-408:1 (same for claim 1 of the '655 patent steps of "processing" and "transmitting"); *id.* at
 21 406:2-407:9, 409:16-410:6 and Lang Decl., Ex. 11 at 6, 8 (same for claim 1 of the '150 patent
 22 steps of "processing," "transmitting," and "providing").

23 Accordingly, Defendants cannot—as a matter of law—directly infringe the asserted claims
 24 because no single entity performs all the steps. *See Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773
 25 (Fed. Cir. 1993).

26 **B. Ubisoft Is Entitled to Summary Judgment Because Digital Reg Accuses
 27 Method Steps Performed Outside the United States.**

28 United States patents, by law, have territorial limits. *See, e.g.*, *NTP*, 418 F.3d at 1317

1 (“We therefore hold that a process cannot be used ‘within’ the United States as required by section
 2 271(a) unless each of the steps is performed within this country.”). Digital Reg asserts **only**
 3 method claims against Ubisoft, and accuses Ubisoft of infringing the method claims by
 4 performing steps outside the United States. Despite black letter law that every method step must
 5 be performed in the United States, Digital Reg’s insistence on pursuing claims that fail on such a
 6 fundamental level is confusing at best. It is also grounds for resolving this case in its entirety as to
 7 Ubisoft at the summary judgment stage.

8 It is undisputed that Ubisoft is not performing **any** accused actions in the United States.
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED].

15 On these undisputed facts, Digital Reg’s allegations against Ubisoft must fail as at least
 16 one step of every asserted claim is performed outside the United States. Digital Reg represented
 17 to this Court that its claims accuse the “background authentication and authorization mechanisms
 18 provided by Uplay,” [REDACTED] Dkt. 504 at 10-11 (Uplay is
 19 the accused product); *see also* Lang Decl., Ex. 7 at 390:12-13 (same), 348:15-16, 338:14-20
 20 (same). In fact, for claims such as claim 45 of the ’670 patent, **all** of the accused Ubisoft activities
 21 occur outside the United States. Lang Decl., Ex. 12 at 53, 61-62, 71. Similar problems exist with
 22 respect to each of the asserted independent claims that Digital Reg’s expert admits are performed
 23 by a Ubisoft server. *See e.g.*, Lang Decl., Ex. 11 at 24; Lang Decl., Ex. 7 at 338:3-339:3, 463:20-
 24 464:21; Lang Decl., Ex. 9 at 26, 30, 33-34.

25 While Dr. Devanbu testified that he “was not concerned” with whether the steps of the
 26 asserted claims were performed in the United States, (Lang Decl., Ex. 7 at 466:24-468:1), U.S
 27 patent law is. The fact that any and all accused Ubisoft activities are performed entirely outside of
 28 the United States precludes any finding of infringement as a matter of law, making summary

1 judgment appropriate. This resolves the entire case as to Ubisoft.³

2 **C. To the Extent Digital Reg Relies on Third Party Activities in Accusing Ubisoft
3 of Infringement, It Has Assembled No Evidence.**

4 In addition to demonstrating that Ubisoft cannot directly infringe, Digital Reg's apparent
5 reliance on third party performance of method steps fails for a complete lack of evidence. Digital
6 Reg did not seek any third-party discovery in this action and, therefore, it has no evidence of how
7 or where any implicated third parties operate. It is undisputed that Ubisoft does not provide or
8 operate any "web servers" or CDNs that appear to be implicated by Dr. Devanbu's infringement
9 theories. For games purchased through the Ubishop or Uplay Express Shop, the third-party web
10 provider is Digital River and the third-party CDN is Limelight Networks. Lang Decl., Ex. 5 at
11 20:9-14, 150:18-151:14; Ex. 7 at 370:5-8. For games purchased through Valve's Steam Platform,
12 any web servers or CDN servers would be operated by Steam and its suppliers, although there is
13 no evidence in the record. Lang Decl., Ex. 7 at 397:15-398:21. As to games purchased through
14 Best Buy, GameStop, or EA's Origin, Digital Reg has assembled no evidence regarding the
15 existence or operation of web servers and CDN servers. Lang Decl., Ex. 7 at 428:25-429:25.
16 Thus, any "web server" or "CDN" required for infringement is operated by an unrelated third-
17 party that Ubisoft does not control, and there is no evidence in the record to show how or where
18 these third parties operate. *See, e.g.*, Lang Decl., Ex. 7 at 347:20-352:18. This alone warrants
19 summary judgment.

20 Further, Dr. Devanbu admitted that he reached his ultimate conclusion that any Uplay-
21 enabled game would infringe the asserted claims based entirely on an "assumption" that games
22 purchased and downloaded from third-party channels "operated in the same way" as games
23 purchased through the Ubishop and Uplay Express Shop. *Id.* at 391:6-11, 403:3-9. He confirmed
24 that neither he nor anyone else associated with Digital Reg attempted to purchase or download a

25 ³ Ubisoft notes that Digital Reg conceded that it will not assert claim 45 of the '670 Patent and
26 claims 1 and 2 of the '150 Patent in its original response to Ubisoft opening claim construction
27 brief and motion for summary judgment because of this extra-territorial issue. For that reason,
28 Ubisoft will not burden the Court with claim construction of claim 45 of the '670 Patent. To the
extent that Digital Reg takes a different approach in its response to this motion, contrary to this
Court's Order (Dkt. No. 555 at 2), Ubisoft reserves the right to raise claim construction arguments
related to those withdrawn claims.

1 game from Steam, Best Buy, or GameStop (*Id.* at 401:8-403:9, 405:8-14, 425:7-12), and that he
 2 did not actually know if “Uplay-enabled games” were available through these channels. *Id.* at
 3 426:2-12, 426:13-428:18, 402:12-431:6 (admitting he has no opinions whether games sold through
 4 EA’s Origin infringe). Thus, Dr. Devanbu’s conclusions, formed without any factual support or
 5 investigation, are not evidence of infringement. *Dynacore Holdings Corp. v. U.S. Phillips Corp.*,
 6 363 F.3d 1263, 1278 (Fed. Cir. 2004) (“It is well settled that an expert’s unsupported conclusion
 7 on the ultimate issue of infringement is insufficient to raise a genuine issue of material fact.”).
 8 Therefore, Ubisoft is entitled to summary judgment as Digital Reg’s claims, to the extent they rely
 9 on third party activities, are not supported by any admissible evidence.

10 **V. DIGITAL REG HAS NO EVIDENCE OF INDIRECT INFRINGEMENT.**

11 As a threshold matter, to establish a claim for indirect—either induced or contributory—
 12 infringement, the patentee must first present evidence of direct infringement, which Digital Reg
 13 has failed to do. *Mirror Worlds, LLC v. Apple Inc.*, 692 F.3d 1351, 1360 (Fed. Cir. 2012); *DSU*
 14 *Med. Corp. v. JMS Co., Ltd.*, 471 F.3d 1293, 1303 (Fed. Cir. 2006) (*en banc*). To establish
 15 contributory infringement, in addition to proving direct infringement by a third party, the plaintiff
 16 must prove that (i) the alleged infringer knew that the accused products were especially made to
 17 practice the method claimed by the patent, and (ii) the accused products have no substantial
 18 noninfringing uses. *See Joy Techs.*, 6 F.3d at 774. The Federal Circuit has made clear that it is the
 19 patentee’s burden to prove the lack of substantial noninfringing uses. *See Golden Blount, Inc. v.*
 20 *Robert H. Peterson Co.*, 365 F.3d 1054, 1061 (Fed. Cir. 2004); *accord, Golden Blount, Inc. v.*
 21 *Robert H. Peterson Co.*, 438 F.3d 1354, 1362 (Fed. Cir. 2006). To establish induced
 22 infringement, the patentee bears the burden of proving (i) direct infringement; (ii) that the alleged
 23 infringer intended to cause the acts constituting the direct infringement; (iii) that the alleged
 24 infringer knowingly and actively aided and abetted the direct infringement; and (iv) that the
 25 alleged infringer possessed specific intent to encourage the direct infringement. *See, e.g., DSU*
 26 *Med. Corp.*, 471 F.3d at 1304; *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301,
 27 1308 (Fed. Cir. 2012). Mere knowledge of possible infringement is not enough; a plaintiff must
 28 show the accused infringer possessed knowledge that the induced acts constitute infringement and

1 the “specific intent to encourage another’s infringement.” *Akamai*, 692 F.3d at 1308; *DSU Med.*
 2 *Corp.*, 471 F.3d at 1306. To possess specific intent, the accused party must “advise[], encourage[
 3], or otherwise induce[] others to engage in infringing conduct.” *Akamai*, 692 F.3d at 1307.
 4 Digital Reg cannot establish the specific intent to encourage another’s infringement necessary for
 5 a finding of induced infringement.

6 Under Digital Reg’s infringement theory, the Symantec CLT products do not necessarily
 7 infringe because renewal of the subscription before denial of access to any aspect of the CLT
 8 products is admittedly noninfringing.⁴ Smith Decl. Ex. 8 at 75:12-20. Digital Reg must,
 9 therefore, “point to specific instances of direct infringement.” *ACCO Brands, Inc. v. ABA Locks*
 10 *Mfrs. Co.*, 501 F.3d 1307, 1313-1314 (Fed. Cir. 2007). There is no evidence of anyone allowing
 11 his or her subscription to expire and subsequently renewing. Nor has any single actor performed
 12 the method steps of any asserted claim of the ’670 and ’059 patents. Further, there is no dispute
 13 that the Symantec does not have the requisite intent [REDACTED]

14 [REDACTED] In other words, Symantec encourages its
 15 customers to operate their products in an indisputably noninfringing manner. Accordingly,
 16 summary judgment is appropriate.

17 With respect to Adobe, Digital Reg has identified no actor or entity that has deployed the
 18 accused software products in a manner which has been shown to perform the asserted method
 19 claims. Digital Reg’s expert has admitted that, at most, he can show only that Adobe’s software
 20 “may” be used in an infringing manner. Beebe Decl. Ex. 13 at 662:4-18. This speculation on
 21 infringement is, as a matter of law, insufficient to survive summary judgment. *E-Pass Techs., Inc.*
 22 *v. 3Com Corp.*, 473 F.3d 1213, 1222 (Fed. Cir. 2007). Similarly, Digital Reg has failed to identify
 23 any evidence that Adobe specifically intended to cause another to infringe any asserted patent
 24 claim. Indeed, the full scope of evidence identified by Digital Reg to support its claims are its
 25 expert’s vague allusion to documents he admits are general purpose product manuals.⁵ Beebe

26 _____
 27 ⁴ Digital Reg is also not able to establish contributory infringement because timely renewal is a
 substantial noninfringing use of the CLT Products.

28 ⁵ Despite the requirements of the Patent Local Rules and contention interrogatories served by
 (continued...)

1 Decl. Ex. 13 at 509:18-510:3. Such documents are not sufficient as a matter of law to demonstrate
2 a specific intent to cause infringement. *Mirror World*, 692 F.3d at 1360-61. Moreover, there is no
3 material dispute that Adobe has a good faith belief that it does not infringe the asserted patents,
4 eviscerating any claim of intent. Beebe Decl. Ex. 13 at 506:5-12; 507:3-13; *Commill USA, LLC v.*
5 *Cisco Systems, Inc.*, 720 F.3d 1361, 167-68 (Fed. Cir. 2013).

6 Digital Reg has made only conclusory statements concerning indirect infringement as to
7 Ubisoft. Further, Dr. Devanbu testified that he undertook no analysis with respect to indirect
8 infringement. Lang Decl., Ex. 7 at 99:8-19, 503:15-510:2, 664:1-3; *Global-Tech Appliances, Inc.*
9 *v. SEB S.A.*, 131 S. Ct. 2060, 2068 (2011). As such, Ubisoft is entitled to summary judgment.
10 Similarly, Digital Reg has offered no evidence that Ubisoft specifically intended to cause another
11 to infringe any asserted patent claim.⁶ Instead, the only reference at all to indirect infringement is
12 the boiler-plate language found on page 1 of Dr. Devanbu’s Expert Report: “Plaintiff further
13 accuses Ubisoft of indirectly infringing the ’670 Patent through providing, authorizing and
14 instructing … to others, including its customers.” *See e.g.*, Lang, Decl., Ex. 12 at 1. This fails to
15 show the requisite intent.

16 Accordingly, Defendants are entitled to summary judgment of no indirect infringement.

17 VI. U.S. PATENT NO. 6,389,541

18 A. **Adobe Is Entitled to Summary Judgment of Noninfringement of all Asserted
Claims of the '541 Patent Under the Agreed Upon Construction.**

20	Claim Term	Agreed Construction
21	executing an installation process that generates at the client a permission that is locked uniquely to the client and that may be found by a later execution of the access checking process	running an installation program that creates a permission locally, which permission is (1) locked uniquely to the client and (2) capable of being found locally by a later execution of the access checking process

⁶ Digital Reg is claiming indirect infringement only on the asserted claims of the '670 and '059 patents. Lang Decl., Ex. 19 at 10-12.

1 “It is axiomatic that claims are construed the same way for both invalidity and
 2 infringement.” *Source Search Techs., LLC v. LendingTree, LLC*, 588 F.3d 1063, 1075 (Fed. Cir.
 3 2009). Yet with respect to “creat[ing] a permission locally,” Digital Reg has asserted
 4 irreconcilable positions on infringement and validity. For infringement, Digital Reg admits that
 5 the object accused as the permission is created at a remote server and then passed to the local
 6 machine. Beebe Decl. Ex. 13 at 619:4-8. For validity, Digital Reg specifically distinguished
 7 the ’541 patent from the prior art on the basis that the permission cannot be created at the remote
 8 server and passed to the local machine. Beebe Decl. Ex. 14 ¶¶ 78-81, 95-101, 119-20.

9 **1. Digital Reg Relies on a Permission Generated at a Remote Server.**

10 Claim 1 of the ’541 patent requires first receiving a token from an external source and then,
 11 based on that token, executing an installation process that generates at the client the claimed
 12 permission. For each of the accused products, Dr. Devanbu has expressly admitted that the
 13 claimed permission he identifies is generated ***at a remote location*** and transmitted to the client.
 14 Beebe Decl. Ex. 4 at 14, 16; Ex. 13 at 620:16-22; 621:8-12 (“Is it fair to say that in your
 15 application of the ’541 to LiveCycle, the information that you claim to be the permission that’s
 16 extracted and stored locally was received from the server? A. Yes.”⁷); Ex. 3 at 19, 23; Ex. 13 at
 17 619:4-8 (same for Flash); Ex. 5 at 13, 14; Ex. 13 at 626:23-627:15; 629:17-24 (same for Software
 18 Activation). This theory is in direct conflict with the parties’ agreed construction, which requires
 19 the permission to be generated locally, not remotely.

20 **2. Digital Reg’s Validity Analysis Excludes a Permission Generated at a
 21 Remote Server.**

22 To preserve validity, Digital Reg adopts a position contrary to its infringement theory.
 23 Specifically, Digital Reg’s expert, Dr. Keller explained that “a person of ordinary skill in the art
 24 would understand that the permission that is generated is something other than the token.” Beebe
 25 Decl. Ex. 14 ¶¶ 119-120; *see also id.* at ¶¶ 77-81 (“***A token in the context of the ’541 patent leads
 26 to the generation of a permission. It is different from the permission itself. . . . [T]he password***
 27

28 ⁷ Dr. Devanbu’s assertion against offline access is fundamentally flawed but accepted for the
 purposes of this motion only.

1 of Shull [sic] cannot satisfy both the requirement of a pre-existing permission and a token.”)⁸ 96,
 2 103. When asked specifically whether the permission could be passed to the client from a remote
 3 server, Dr. Keller steadfastly denied this was permissible. Beebe Decl. Ex. 15 at 172:19-25 (“Q.
 4 [W]hatever it is that one would point to to be that permission has to have been created at the client
 5 and cannot simply be the thing that was passed from the server to the client. Is that fair? A. It has
 6 to be – correct. It has to be generated at the client.”). This distinction is the only ground on which
 7 Dr. Keller distinguished the prior art reference Schull.

8 In light of the conflict noted above, Digital Reg’s infringement theory should be rejected as
 9 a matter of law. In the alternative, Adobe has identified clear and convincing evidence that the
 10 ’541 patent is invalid when understood in light of Digital Reg’s infringement analysis, based on at
 11 least Schull. Beebe Decl. Ex. 11 at 74-100. Applying the agreed-upon construction for this term
 12 and Digital Reg’s own proposed constructions for other limitations, the only basis identified by
 13 Dr. Keller supporting the validity ’541 patent is his view that the permission must be generated
 14 locally. Beebe Decl. Ex. 14 ¶¶ 70-85. If Digital Reg’s flawed infringement theory is adopted,
 15 Adobe is entitled to summary judgment of invalidity.

16 **B. Adobe Is Entitled to Summary Judgment of Noninfringement of All Asserted
 17 ’541 Claims Under Its Proposed Construction of “token.”**

<i>Claim Term</i>	<i>Adobe’s Construction</i>	<i>Plaintiff’s Construction</i>
Token	a file indicating whether the transaction has been approved	a file indicating whether access should be granted

20 Adobe’s construction is taken *directly from* the specification: “The token is a file
 21 indicating whether the transaction has been approved; i.e. whether the object should be installed
 22 and access granted.” Beebe Decl. Ex. 1 at 5:1-3. Digital Reg argues that Adobe’s construction is
 23 limited to a financial transaction. Not so. A transaction is simply an interaction between parties.⁹
 24 *Id.* at 4:13-64. Digital Reg’s construction cherry picks language from this definition and omits
 25 language less convenient – “The token is a file indicating whether ~~the transaction has been~~

27 ⁸ Emphasis added and internal citations omitted throughout, unless otherwise noted.

28 ⁹ This is consistent with Adobe’s proposed construction for “authorization procedure.”

1 approved; i.e. whether the object should be installed and access granted.” *Id.* at 5:1-3.

2 A related dispute between the parties is over the scope what it means to “indicat[e] . . .
 3 approval.” Adobe contends that the file specifically approves or denies the transaction (i.e., is a
 4 yes or no indicator) – the only type of indication disclosed in the specification. *Id.* at 4:65-5:15;
 5 10:26-47 (“. . . the *first bit signifies acceptance* and the following 127 bits are ‘dummy’ bits
 6 utilized for conveying information only when a rejection has occurred.”); *see also id.* at 10:41-58.
 7 Digital Reg has not been able to provide any evidence to the contrary.

8 **1. Adobe Is Entitled to Summary Judgment Under Its Construction.**

9 Digital Reg’s expert did not opine on infringement under Adobe’s proposed construction.
 10 Beebe Decl. Ex. 3 at 19; Ex. 4 at 15; Ex. 5 at 13. In contrast, Adobe’s expert explained why this
 11 limitation is not met for each of the accused products. *Id.* Ex. 8 at ¶¶ 98-101. Under Adobe’s
 12 proposed construction, there is no material factual dispute and summary judgment is appropriate.

13 **C. “(an) authorization procedure”**

<i>Claim Term</i>	<i>Adobe’s Construction</i>	<i>Plaintiff’s Construction</i>
authorization procedure	approve or reject a payment transaction or use information	process which determines whether access should be granted

17 The specification recites, “[t]he payment server directs the external authorization
 18 procedure, *based on the payment/use information received.*” It is universal throughout the
 19 specification that the authorization procedure is a procedure for approving or rejecting payment
 20 and/or use information.” Beebe Decl. Ex. 1 at Abstract; 4:13-64; 10:9-26. Moreover, Digital
 21 Reg’s concession that “it is clear from the specification and claims that either payment or use
 22 information can be provided to gain access to content” resolves this issue. Dkt. No. 510 at 9.

23 **D. Adobe’s Accused Products Are Licensed When Used in a Windows
 24 Environment.**

25 Under Digital Reg’s own reading of its license with Microsoft, infringement of the ’541
 26 patent cannot occur when a Microsoft product performs at least one step of the asserted claims.
 27 Thus summary judgment on the asserted ’541 patent claims is proper for all uses of Adobe

1 products in a Windows environment.¹⁰

2 The existence of a license is undisputed. Dkt. No. 438 [9/26/13 Order] 6. Under Digital
 3 Reg's expert's own reading of the license, a user is licensed when a Microsoft product performs a
 4 step of the claimed method. Beebe Decl. Ex. 17 ¶¶ 49-50; Ex. 18 at 169:2-8. And Digital Reg's
 5 infringement expert, Dr. Devanbu, admits that at least three steps of the '541 patent—"requesting
 6 permission from an external source for the resource to access the digital content"; "receiving from
 7 the external source at token"; and "executing an access checking process"—require the use of
 8 Microsoft products in a Windows environment. Beebe Decl. Ex. 13 at 651:7-17; 651:19-652:7.

9 **VII. U.S. PATENT NO. 7,421,741**

10 **A. Adobe Is Entitled to Summary Judgment of Noninfringement or, in the
 11 Alternative, Invalidity Based on Digital Reg's Irreconcilable Positions.**

12 Adobe's expert, Dr. Wicker, analyzed Adobe's prior art Digital Commerce system and
 13 found that it anticipated the '741 patent under Digital Reg's proposed constructions. Dkt. No. 540
 14 Ex. C(a) at 65-67; Beebe Decl. Ex. 11 648-694; Ex. 24; Ex. 36. In Digital Reg's rebuttal report,
 15 Dr. Keller failed to identify a single claim limitation that was not expressly disclosed under Digital
 16 Reg's constructions. Beebe Decl. Ex. 14 ¶¶ 329-338. Instead, Dr. Keller distinguished Adobe's
 17 Digital Content system by implying there was a new claim construction dispute over the meaning
 18 of "container identifier." *Id.* ¶ 332. Specifically, Dr. Keller opined that a container identifier
 19 must be container specific, not content specific – i.e., each transmission of a container (say, for
 20 example, each downloaded copy of a book) must use a unique identifier. Beebe Decl. Ex. 15 at
 21 193:15-20 ("Q. Okay. So as I understand that distinction correctly, from your perspective,
 22 container identifier has to be container-specific, not content-specific? A. A container identifier
 23 has to be container-specific; that's correct."). Indeed, Dr. Keller explained that his validity
 24 analysis **would not hold** if a copy of a book was sent to multiple purchasers without changing the
 25 identifier each time. *Id.* at 195:17-196:13.

26 ¹⁰ Adobe's current motion focuses on a reading of the license agreement that Digital Reg itself
 27 advocated when Adobe previously raised this issue (i.e., that the agreement covers, at a minimum,
 28 the 541 patent) and the subsequent admissions of Digital Reg's own experts. It thus seeks
 summary judgment on different grounds than the defendants' prior motion on the license issue.

1 In analyzing infringement, however, Digital Reg’s expert asserted that Adobe’s accused
 2 products utilize a content-specific identifier, not a container-specific identifier. Beebe Decl. Ex.
 3 22 at 4; Ex. 13 at 644:23-645:9. In the specific case of e-books, Dr. Devanbu conceded that the
 4 same identifier would apply to all distributed copies of a book. Beebe Decl. Ex. 21 at 5; Ex. 13 at
 5 642:12-14 (“Q. . . . In Adobe Digital Publishing, every copy of “Moby Dick” would share a single
 6 ID; correct? A. That’s my understanding, yes.”).

7 Accordingly, if Dr. Keller’s understanding of “container identifier” is accepted, there is no
 8 material dispute on noninfringement. But if Digital Reg’s infringement theory is accepted, it has
 9 offered no rebuttal to Adobe’s showing that all asserted ’741 claims are invalid.

10 **B. Adobe Is Entitled to Summary Judgment of Noninfringement of All Asserted
 11 741 Claims Under Its Construction of “encrypting a header.”**

Claim Term	Adobe’s Construction	Plaintiff’s Construction
encrypting a header	encrypting the beginning of a block of data	encrypting control information including at least a key associated with a data block

12 In common parlance, a header implies the beginning of an object—such as header to a
 13 document. This same understanding is employed by the ’741 patent when describing the header
 14 of a block data. Figure 2, for example, depicts secure digital container (“SDC”) 120. The header
 15 230A of the SDC, not surprisingly, is at the beginning of the first data block. Similarly, Figure 6
 16 depicts the header 605 at the head of the permission token structure. Digital Reg, on the other
 17 hand, seeks a construction that reads out any positional requirement. Indeed, it is Digital Reg’s
 18 position, argued by its expert to demonstrate infringement, that a file header can be entirely
 19 separate from the file altogether. That is, the header can be in a completely different file from the
 20 file for which it is a header.

21 Digital Reg’s construction is counterintuitive and has no support in the specification. First,
 22 “control information” appears nowhere in the ’741 patent. Second, the ’741 patent expressly
 23 states that the “header [is] associated with a first data block of the electronic content” – not any
 24 data block, but the ***first data block of the electronic content***. Beebe Decl. Ex. 19 at 3:15-18, 27-
 25 35. Digital Reg’s construction dismembers the header from the data it is intended to be
 26 “associated with.”

1 Furthermore, the patentee expressly disclaimed systems that send the decryption key in a
 2 license separate from the content during prosecution. Beebe Decl. Ex. 20 at ADOBE-DR0063813
 3 (discussing the Downs reference). This disclaimed subject matter cannot be re-claimed now.
 4 *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1307-08 (Fed. Cir. 2007); *Omega*
 5 *Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003).

6 Finally, Digital Reg's proposal conflicts with its own expert's understanding of header.
 7 When discussing the '515 patent, Dr. Devanbu explained that "every packet [of an HTTP
 8 transmission] is composed of a header and payload." Beebe Decl. Ex. 35 at 14-15. Dr. Devanbu
 9 thus recognized that headers are the start of a data packet, not simply disembodied information
 10 "associated with" a data block. Adobe's expert also agrees that a header is "the leading data
 11 blocks for a specific file, object, or data." Beebe Decl. Ex. 8 at ¶ 382.

12 **1. Adobe Is Entitled to Summary Judgment Under Its Construction.**

13 Dr. Devanbu has offered no infringement opinion under Adobe's proposed construction.
 14 Beebe Decl. Ex. 22 at 14; Ex. 21 at 11, 13; 23. Thus, summary judgment is appropriate under
 15 Adobe's proposed construction.

16 **C. Adobe Is Entitled to Summary Judgment of Noninfringement of All Asserted**
 17 **741 Claims Under Its Proposed Construction of "re-keying the header."**

Claim Term	Adobe's Construction	Plaintiff's Construction
re-keying the header	re-encrypting the header using a different encryption key	re-encrypting the key

20
 21 The '741 patent explains, and the parties agree, that re-keying means re-encrypting. Beebe
 22 Decl. Ex. 19 ['741 patent] at 4:49-54. The parties dispute whether the re-encryption is of the
 23 header (Adobe's position) or only of the key hidden within it (Digital Reg's position).

24 The plain language of the term resolves this issue – "re-keying the **header**." The patent
 25 repeatedly explains that the header is re-encrypted. *Id.* at 2:18-21, 40-44; 2:67-3:4; 3:12-24, 35-
 26 36, 52-53; 11:64-67; 14:4-7. This necessarily encrypts the key (the key is included in the header),
 27 but the key is not header. Indeed, this difference is recognized by Digital Reg's construction for
 28 "header," which is "control information including at least a key."

1 **1. Adobe Is Entitled to Summary Judgment Under Its Construction.**

2 Digital Reg's expert, Dr. Devanbu, does not analyze the accused products under Adobe's
 3 construction. Beebe Decl. Ex. 21 at 17; Ex. 22 at 16. Thus, summary judgment of non-
 4 infringement is appropriate for all products.

5 **D. “header associated with a first data block of the electronic content”**

<i>Claim Term</i>	<i>Adobe's Construction</i>	<i>Plaintiff's Construction</i>
header associated with a first data block of the electronic content	data at the beginning of the first block of the electronic content	No construction necessary

9 This term is intertwined with the previous term “encrypting a header.” The header is data
 10 at the beginning of a block of data and a header associated with a first data block is the header of
 11 the first data block. *See, e.g.*, Figure 2. Digital Reg's application of the term reads out
 12 embodiments where the header is associated with blocks other than the first data block. Beebe
 13 Decl. Ex. 19 at 7:50-56.

14 **VIII. U.S. PATENT NOS. 6,751,670 and 7,673,059**

15 The '670 patent, entitled “Tracking Electronic Component,” describes and claims a method
 16 of tracking electronic content. Smith Decl. Ex. 1. The '059 patent, entitled “Tracking Electronic
 17 Content,” is a continuation of the '670 patent. Smith Decl. Ex. 2. As such, the '670 and '059
 18 patents share an identical specification and figures.

19 **A. Defendants Are Entitled to Summary Judgment of Noninfringement Based on
 20 the “based on a result of the attempted transmission” Limitation.**

<i>Claim Term</i>	<i>Defendants' Construction</i>	<i>Plaintiff's Construction</i>
based on a result of the attempted transmission	based on whether or not notification information is sent	No construction necessary

23 The parties dispute whether access is granted based on whether or not information is sent
 24 (Defendants' position) or whether a response is received (Digital Reg's position). The plain
 25 language of the claim term dictates Defendants' construction. The claims recite “transmission”,
 26 not “receipt.” Indeed, the patentee and Digital Reg's validity expert Dr. Arthur Keller both agree
 27 with Defendants that these claims require granting or denying access based on the act of trying to
 28 transmit notification information, whether successful or not, which is separate and distinct from

1 granting access upon receiving an access granting message (*i.e.*, server authorization).¹¹ The
 2 patent claims themselves clearly distinguish between granting access “based on the results of an
 3 attempt to transmit” (*see, e.g.*, Lang Decl., Ex. 1 at claim 32), which can be “successful” or
 4 “unsuccessful” (*see, e.g. id.* at claim 33), versus the entirely separate concept of “receiving an
 5 access granting message.” *Id.* at claim 34; *see also id.* at 8:16-20 (noting that a “network
 6 acknowledgment message” may indicate successful transmission). Indeed, the patentee described
 7 an “attempt to transmit” as “the act of trying” (Lang Decl., Ex. 14 at 20-21), and further stated
 8 that “the invention as claimed grants access immediately upon transmission of the notification,
 9 without waiting for a response from the server to grant access. In other words, the transmission of
 10 the notification is the triggering event for granting access, not an authorization from the server.”
 11 Lang Decl., Ex. 15; Ex. 16.

12 **1. Ubisoft Is Entitled to Summary Judgment of Noninfringement Based
 13 on the Opinions of Digital Reg’s Experts.**

14 The only person who disagrees with this interpretation is Digital Reg’s infringement
 15 expert, Dr. Devanbu, who is forced to take an opposite position not because the patents require it,
 16 but because his infringement theory, at least against Ubisoft, is predicated on server log-in
 17 authorization, which he admits is an “application layer message being sent.” Lang Decl., Ex. 7 at
 18 462:1-464:21 (testifying that “user authentication at a server” meets the “attempting to transmit”
 19 limitation). Given that Digital Reg’s own experts disagree on what the claim term means, Digital
 20 Reg’s “no construction” position rings hollow. In light of the claims, the specification, and the
 21 prosecution history of the patents-in-suit, Ubisoft’s construction should be adopted. Digital Reg

23 ¹¹ Digital Reg’s validity expert – in trying to distinguish the prior art – explained the
 24 difference as follows: [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 has offered no opinion and there is no evidence to support a finding of infringement under
 2 Defendants' construction and, therefore, Ubisoft is entitled to summary judgment.

3 **2. Adobe Is Entitled to Summary Judgment of Noninfringement Based on**
 4 **the Opinions of Digital Reg's Experts.**

5 Here, Digital Reg has again pitted its experts against each other with respect to validity and
 6 infringement. For validity, Digital Reg's expert Dr. Keller construed the term "granting access
 7 based on the results of the attempted transmission" to mean "whether or not the transmission itself
 8 succeeded on *a network level*," which to Dr. Keller "is distinct from the granting access based on
 9 an application-level return of a password." Beebe Decl. Ex. 15 at 160:2-25; Ex. 14 ¶¶ 145, 147.
 10 Digital Reg's infringement expert, however, "contend[s] that the attempted transmission here is
 11 interpretable as an application layer message being sent."¹² Ex. 13 at 463:17-19.

12 For all accused products under the '670 patent, Dr. Devanbu's infringement analysis relies
 13 wholly on the return of an application-level response, which is directly contrary to the construction
 14 used by Digital Reg's validity expert. Beebe Decl. Ex. 30 at 4, 16 (Digital Publishing); Ex. 31 at
 15 2, 23 (Flash); Ex. 13 at 574:15-576:3 ("So, in this case, I read the attempt to transmit in this, as
 16 discussed earlier, that it's an attempt to transmit at the application layer."), 576:14-20; Ex. 32 at
 17 19, 23 (LiveCycle); Ex. 13 at 575:7-14 (And it's based on that receipt of that information from the
 18 server that access is granted; correct? A. Yes."); Ex. 33 at 10, 19-20 (Software Delivery). Dr.
 19 Devanbu offers no evidence or opinion that the accused products provide a network level
 20 response.¹³

21 **B. "selectively grants or denies access"**

22 Claim Term	23 Defendants' Construction	24 Plaintiff's Construction
selectively grants or denies access	granting and/or denying access to select parts of the electronic content	No construction necessary

25 ¹² Digital Reg's internal argument between a "network level" response and an "application
 26 level" response, none of which is reflected in either party's construction, highlights the desperate
 27 measures being taken try to prove infringement.

28 ¹³ While the specific limitation at issue relates only to Claim 32, as shown above Digital Reg
 29 relies on the same analysis and claim interpretation to support its infringement analysis for Claim
 30 45's requirement that access be "denied until notification information . . . has been successfully
 31 transmitted. Adobe is thus entitled to summary judgment on both claims.

1 This term is found in the '541, '670, and '515 patents. Defendants' construction matches
 2 exactly with how the patentee described the invention when overcoming a patentability rejection
 3 under 35 U.S.C. § 101. Beebe Decl. Ex. 29 at ADOBE-DR0059314-15. Selectively
 4 granting/denying means allowing or denying access to only select parts or operations of the
 5 electronic content. Digital Reg's apparent understanding reads out the term "selectively."

6 **C. Dr. Keller's Opinion on the Meaning of "notification information" Warrants
 7 Partial Summary Judgment for Adobe.**

8 All asserted claims of the '670 patent require the collection of "notification information."
 9 Neither side proposed this term for construction. In distinguishing the prior art asserted against
 10 the '670 patent, Dr. Keller formed a new opinion that "'notification information' as used by the
 11 '670 patent is information 'to identify and track the recipient.'" Beebe Decl. Ex. 14 ¶ 140. Digital
 12 Reg has failed to support this construction and it should be rejected. If adopted, Adobe is entitled
 13 to summary judgment with respect to the Digital Publishing Tools, Flash, and its Software
 14 Delivery, Licensing, and Activation services because Digital Reg has identified no infringement
 15 theory or evidence that the alleged "notification information" is intended or used to track the use
 16 of content in the accused products. Beebe Decl. Exs. 30-32. Put differently, summary judgment is
 17 appropriate because Digital Reg applied one construction to preserve the validity of the claims, but
 18 did not apply that same construction to demonstrate infringement.

19 **D. The Symantec CLT Products Do Not Deny Access to the Electronic Content
 20 Until Notification Information is Transmitted.**

21 Claim 32 of the '670 patent requires the step of "deny[ing] access to the electronic content
 22 **until** the notification information is transmitted." Smith Decl. Ex. 1 at 13:21-23. Similarly, claim
 23 45 of the '670 patent requires a "file that includes electronic content and causes access to the
 24 electronic content to be denied **until** notification information collected by executable instructions
 25 has been successfully transmitted." *Id.* at 13:6-8. In other words, for both claims, access to the
 26 electronic content is denied at least until after notification information is transmitted. Similarly,
 27 claim 16 of the '059 patent requires the step of "upon transmission of an authorized user
 28 identifier . . . **access is granted** to at least a portion of the electronic data." Smith Decl. Ex. 2 at

1 12:32-35. In other words, access to the electronic data is initially denied. Only “upon
 2 transmission of an authorized user identifier” is access granted.

3 In contrast, it is undisputed that the Symantec CLT products provide access to the
 4 electronic content **before** the alleged notification information is transmitted. *See* Smith Decl. Ex.
 5 8 at 77:11-15. More specifically, Digital Reg alleges that the Symantec CLT products transmit
 6 “notification information” in connection with software activation. *Id.* at 83:11-15 (“when the
 7 license on the client side is being activated, notification is sent”).

8 Dr. Devanbu, however, conceded in his deposition that the software activation does not,
 9 however, occur until **after** “the end-user is provided with full access to all features within
 10 Symantec products.” Smith Decl. Ex. 8 204:22-205:12. In other words, Symantec’s CLT
 11 products initially grant access to the electronic content and only subsequently deny access if, and
 12 when, the product expires. Dr. Devanbu made similar concessions for claim 45 of the ’670 patent
 13 and claim 16 of the ’059 patent. Smith Decl. Ex. 8 205:25-206:7, 206:21-207:4 with respect to
 14 claim 45 and 234:4-9, 22-24 with respect to claim 16.

15 Because it is undisputed that the Symantec CLT products do not deny access to the
 16 electronic content until notification information is sent, the Court should grant summary judgment
 17 of noninfringement as to claims 32 and 45 of the ’670 patent and claim 16 of the ’059 patent.

18 **E. “recipient”**

19 Claim Term	20 Defendants’ Construction	21 Plaintiff’s Construction
recipient	user that receives the electronic content	no construction necessary

22 The parties’ dispute turns on whether a “recipient” must be a “user” (Defendants’ position)
 23 or whether a “recipient” is anyone or anything that receives the electronic content (Digital Reg’s
 24 apparent position). Defendants’ proposed construction is fully supported by the intrinsic evidence.

25 Indeed, Defendants’ proposed construction comports with the ’670 patent’s only embodiment.
 26 The specification teaches that “a **user** sending e-mail often cannot be sure the intended
 27 **recipient** ever read or received the e-mail.” Smith Decl. Ex. 1 at 1:15-17. The specification goes
 28 on to state that “[m]any e-mail software packages enable a **user** receiving an e-mail attachment to

1 easily forward received attachments to *other recipients*.” *Id.* at 1:31-33. A “recipient” is therefore
 2 a “user” according to the ’670 patent’s specification.

3 The prosecution history of the ’670 patent further confirms that a “recipient” is a “user.”
 4 In an office action dated June 5, 2002, the PTO rejected the application for the ’670 patent as
 5 obvious in light of several prior art references. Smith Decl. Ex. 4. In its December 2002 response
 6 to the office action, Digital Reg argued that the cited prior art was based on the purportedly novel
 7 “successive recipient” feature. In doing so, Digital Reg equated the claim term “recipients” with
 8 “users.” Smith Decl. Ex. 5 at 9 (“the executable instructions allows [sic] for the collection of
 9 notification information . . . for successive *recipients* (i.e., *users*).”). Within that same response,
 10 Digital Reg used “successive recipient” and “successive user” interchangeably, again indicating
 11 that the patentee understood that the claimed “recipient” was a “user.” Smith Decl. Ex. 5 at 10
 12 (“[The prior art] indicates a pre-determined addressing scheme wherein the *recipients* are pre-
 13 targeted It is clearly not the dynamic *successive user* identification of the present
 14 invention.”). The intrinsic record therefore makes clear that the “recipient” refers to a “user.”
 15 Indeed, Digital Reg is bound to such construction in view of the file history. *Phillips*, 415 F.3d at
 16 1317. The Court should therefore adopt Defendants’ proposed construction.

17 Digital Reg provides no guidance as to how this term should be understood by the Court
 18 under plain and ordinary meaning. It cannot be that anyone or anything that handles the electronic
 19 data is a recipient. The logical conclusion from such a sweeping construction is that any
 20 intermediary is then a recipient. For example, if a letter is sent from party A in New York to party
 21 B in San Francisco, the mailbox is a recipient, the mailman is a recipient, the sorting office is a
 22 recipient, the truck and airplane are recipients, and so on and so forth until the letter is received by
 23 party B. This is an absurd conclusion and inconsistent with the specification.

24 Moreover, The ’670 patent makes clear that a “recipient” cannot be a distribution server.
 25 In fact, the ’670 patent specifically describes multiple digital distribution mechanisms including e-
 26 mail, FTP, and HTTP, each of which require an intermediary server through which electronic
 27 content is temporarily stored prior to a recipient downloading the content. *See, e.g.*, Lang Decl.,
 28 Ex. 1 at 4:2-6; claim 46. Yet, throughout the claims, specification, and file history, these

1 intermediary servers are *never* identified as a “recipient.” By proposing no construction at all,
 2 Digital Reg is attempting to read out claim requirements, including those added to obtain issuance
 3 of the asserted patent.

4 **F. Symantec and Ubisoft Are Entitled to Summary Judgment Based Upon
 5 Defendants’ Construction of “successive recipient” / “successive computer.”**

6 Claim Term	7 Defendants’ Construction	8 Plaintiff’s Construction
9 successive recipient	user that receives electronic content from a previous recipient	no construction necessary
successive computer	user’s computer that receives electronic content from a previous user’s computer	no construction necessary

10 The parties’ dispute on this term relates to whether or not a “successive recipient” must
 11 receive the electronic content from a previous recipient or whether a “successive recipient” can
 12 include a user that receives electronic content from a server later in time from some other user, as
 13 Digital Reg attempts to quietly capture through its “no construction” approach. As explained
 14 below, Defendants’ proposed construction is compelled based on both the intrinsic evidence and
 15 prosecution history disclaimer as to “successive recipient” and “successive computer.”

16 Starting with the specification, Figure 2B of the ’670 patent shows a second “successive”
 17 recipient receiving the electronic content from an initial recipient. The ’670 patent explains that
 18 “after transmission to a recipient 125, the envelope 100 remains a convenient way to transmit
 19 electronic content 105 included in the envelope 100 to others. Thus, *a recipient 125 can easily re-*
 20 *transmit the received electronic content 105 to one or more new recipients* 135 by forwarding the
 21 received envelope 100 in a new e-mail message 115b.” Smith Decl. Ex. 1 at 5:14-21. In other
 22 words, the specification teaches that the “successive recipient” receives the electronic content
 23 from a previous recipient. There is no discussion whatsoever in the specification or claims to
 24 suggest that a user who receives electronic content later in time than some other user from the
 25 same server would fall within the plain meaning of “successive recipient.”

26 Further, in addition to these teachings from the specification, Digital Reg disclaimed what
 27 is now its litigation-induced “successive in time” theory. Digital Reg limited the term “successive
 28 recipient” to a user that received electronic content from a prior recipient. Indeed, in response to a

1 July 2001 office action rejecting all claims as obvious over prior art, Digital Reg amended the
 2 independent claims to include “transmitting, notification information from successive recipients to
 3 an address other than that of the immediate sender of the electronic content.” Smith Decl. Ex. 6
 4 at 4. In doing so, Digital Reg explained that the term “successive recipients” referred to “those
 5 who receive the electronic content *from an intended recipient* (i.e., when an e-mail is forwarded
 6 to other recipients).” *Id.* The applicant’s definitional explanation of “successive recipient”
 7 focuses unequivocally on the idea that a successive recipient receives electronic content from a
 8 previous, intended recipient. It is not a recipient that simply receives electronic content from a
 9 server later in time than some other random recipient.

10 The PTO again rejected the claims of the ’670 patent as obvious over the Venkatraman
 11 prior art reference. Digital Reg responded by again focusing on the allegedly non-obvious
 12 “successive recipient” limitation. In doing so, Digital Reg confirmed that “[t]he *present invention*
 13 is directed, in general, to a method of tracking electronic content through successive recipients”
 14 and that “[t]he envelope may be re-transmitted by an *initial recipient* to *successive recipients*.
 15 Smith Decl. Ex. 5 at 6-7. Digital Reg then distinguished the claims of the ’670 patent over the
 16 Venkatraman prior art reference on the ground that “[n]owhere [within Venkatraman] is there an
 17 indication that the *initial recipient* is capable or even permitted to re-transmit the initial e-mail
 18 onward to *other (successive) recipients*.
Id. at 10. By stating that the missing element in
 19 Venkatraman was the capability of the initial recipient to re-transmit the initial e-mail onward to
 20 other (successive) recipients, the applicant restricted the ’670 claims to a system where the initial
 21 recipient re-transmits electronic content to other (successive) recipients. A server that merely
 22 sends the same electronic content to recipients at different points in time does not satisfy this
 23 limitation. Yet, Digital Reg is now trying to recapture exactly what it gave up to avoid
 24 Venkatraman. If given the “later in time” meaning Digital Reg attributes to the term “successive,”
 25 the prior art, Venkatraman, can no longer be distinguished. It is not credible to say that
 26 Venkatraman does not teach sending an email from a server to more than one recipient —Digital
 27 Reg would have to argue that Venkatraman discloses sending one email, and only one email, in
 28

1 the entire life of the system.¹⁴ The law dictates that clear and unambiguous disavowal of claim
 2 scope during prosecution—which is the case here—inform the claim construction analysis by
 3 “narrow[ing] the ordinary meaning of the claim congruent with the scope of the surrender.”
 4 *Omega*, 334 F.3d at 1324. Digital Reg cannot ignore the intrinsic record in an effort to recapture
 5 subject matter surrendered during prosecution.

6 Similarly, to obtain allowance of the '059 patent, Digital Reg made clear that the
 7 “successive computer” received electronic content from a previous user’s computer. For example,
 8 in a June 2006 response to an office action, Digital Reg argued that “the term ‘successive’ has a
 9 specific meaning which includes ‘consecutive,’ for example.” Smith Decl. Ex. 7 at 10. In other
 10 words, Digital Reg again emphasized that its invention required successive computers (or
 11 successive recipients) that receive electronic content serially from one another. Additionally,
 12 Digital Reg’s technical expert agrees that a “successive computer” is the computer operated by a
 13 “successive recipient.” Smith Decl. Ex. 8 at 173:21-24.

14 In summary, the intrinsic record, and the prosecution disclaimers made therein, confirm
 15 that the claimed “successive recipient” or “successive computer” receives electronic content from
 16 a previous recipient or previous user’s computer. Further, by proposing no construction at all,
 17 Digital Reg is attempting to eliminate claim requirements, including those added to obtain
 18 issuance of the asserted patent. The Court should therefore construe “successive recipient” as a
 19 “user that receives electronic content from a previous recipient” and “successive computer” as a
 20 “user’s computer that receives electronic content from a previous user’s computer.”

21 **1. Symantec Does Not Infringe Under Defendants’ Proposed Construction.**

22 The first step of claim 32 of the '670 patent requires “collecting notification information
 23 from a recipient and *successive recipients* of the electronic content” Smith Decl. Ex. 1 at
 24 13:9-10 . The final step of claim 45 requires “receiving notification information from a *successive*
 25 *recipient*” *Id.* at 14:10-11. The second step of claim 16 of the '059 patent requires

26 ¹⁴ Digital Reg also argues that claim 74 of the '670 patent somehow contradicts Defendants’
 27 proposed construction. To the contrary, claim 74 explicitly requires “transmitting the envelope
 28 from the first recipient to one or more successive recipients.” Smith Decl. Ex. 1 at 16:30-31.
 Defendants’ proposed construction of “successive recipient” is consistent with claim 74.

1 “transmitting the received electronic data and executable instructions to one or more *successive*
 2 *computers.*” Smith Decl. Ex. 2 at 12:28-29. At his deposition, Dr. Devanbu confirmed that he
 3 treated “successive recipient” and “successive computer” synonymously. Smith Decl. Ex. 8 at
 4 173:21-24. For purposes of claim construction, Digital Reg also treated the terms identically.

5 Digital Reg concedes noninfringement under Defendants’ proposed construction of
 6 “successive recipient.” Indeed, Digital Reg alleges that the “recipient” would be a first end-user
 7 who downloads the accused CLT software from Symantec and that a “successive recipient” would
 8 be any subsequent end-user who downloads that same CLT software from Symantec. Dr. Devanbu,
 9 confirmed Digital Reg’s infringement theory at his deposition. Smith Decl. Ex. 8 at 176:9-18
 10 (discussing a scenario where John Doe downloads software from Symantec and then Jane Doe
 11 downloads software from Symantec). In this scenario, Jane Doe would not be a “successive
 12 recipient” under Defendants’ proposed construction because Jane Doe did not receive the
 13 Symantec software from the recipient John Doe. At his deposition, Dr. Devanbu confirmed that he
 14 had not considered Defendants’ proposed construction of “successive recipient.” Smith Decl. Ex.
 15 8 at 167:10-14. Further, there is no evidence of an end-user (John Doe) transferring the accused
 16 CLT software to another end-user (Jane Doe). *Id.* at 230:8-22.

17 In contrast, Symantec’s technical expert, Dr. Stubblebine, considered Defendants’ pro-
 18 posed construction of “successive recipient” and “successive computer” and concluded that the
 19 accused CLT software does not infringe under that construction. Smith Decl. Ex. 9 at ¶¶ 64-70,
 20 166. In cases like this one, the Federal Circuit holds that a patentee must offer *expert* opinion of
 21 infringement or it cannot overcome the expert testimony of noninfringement. *See Centricut, LLC*
 22 v. *Esab Group, Inc.*, 390 F.3d 1361, 1369 (Fed. Cir. 2004).

23 Thus, if the Court adopts Defendants’ proposed claim constructions Digital Reg cannot
 24 show that Symantec infringes claims 32 and 45 of the ’670 patent or claim 16 of the ’059 patent.
 25 Summary judgment of no infringement is therefore warranted.

26 **2. Ubisoft Does Not Infringe Under Defendants’ Proposed Construction.**

27 Digital Reg advances a “no construction necessary” approach to this term so that it can
 28 simultaneously attempt to pursue multiple conflicting infringement theories. Digital Reg’s expert,

1 Dr. Devanbu, testified that the term “successive recipient” can mean different things in different
 2 claims, and could have a different construction “depending on the context in which you’re being
 3 asked to offer an opinion on infringement.” Lang Decl., Ex. 7 at 459:19-461:21, 175:21-177:24.

4 For Ubisoft, Digital Reg claims that infringement of claim 32 of the ’670 patent occurs
 5 when a user downloads the same game from a CDN server to two different computers. Lang
 6 Decl., Ex. 12 at 15. Under Digital Reg’s theory, the user is a “recipient” first time the user
 7 downloads the game, and the second time the same user downloads the same game from a
 8 different computer they are the “successive recipient.” This theory does not contemplate digital
 9 content being sent from one “recipient” to a “successive recipient” – in fact, to the contrary, in
 10 both situations the user is downloading the content from the same CDN server.¹⁵ Wicker Decl.,
 11 Ex. A at 25.

12 For claim 45 of the ’670 patent and claim 16 of the ’059 patent, Digital Reg claims that
 13 when a game is uploaded by Ubisoft to a CDN distribution server, there is no “first recipient,” but
 14 every user that receives the game from the distribution server is a “successive recipient” (claim 45
 15 of the ’670 patent) or “successive computer” (claim 16 of the ’059). Lang Decl., Ex. 12 at 67-68;
 16 Ex. 9 at 20; Ex. 7 at 460:7-19. This theory is also at odds with the claims, specification, and file
 17 history of the ’670 and ’059 patents, as a first user to receive electronic content from a distribution
 18 server cannot be the “successive recipient” or “successive computer.” Digital Reg has offered no
 19 opinion, and there is no evidence to support a finding of infringement, under Defendants’
 20 proposed construction. In fact, Dr. Devanbu admitted that he was not aware of any circumstance
 21 in which one user transmitted a Ubisoft video game to another user. *Id.* at 456:21-457:23 (“I don’t
 22 play games, so I don’t know . . .”). Accordingly, Ubisoft is entitled to summary judgment.

23 **G. The Ubisoft Products Do Not Infringe the ’059 Patent as Access Is Not
 24 Granted “Upon Transmission” of an Authorized User Identifier.**

25 Digital Reg’s infringement theory is directly contrary to the plain and ordinary language of
 26 claim 16 of the ’059 patent, which requires the following: “***upon transmission*** of an authorized

27 ¹⁵ For games downloaded through the UbiShop and Uplay Express Shop, the CDN server is a
 28 Limelight server; for all other distribution channels there is no evidence in the record.

1 user identifier ... access is granted to at least a portion of the electronic content.”¹⁶ Lang Decl.,
 2 Ex. 2 at cl. 16. Digital Reg claims that logging in to a Ubisoft server meets the “upon
 3 transmission” requirement, as is evidenced by the report of Dr. Devanbu: “Once the authorized
 4 user identifier has been ***transmitted and processed successfully***, a user is granted access to game
 5 content.” Lang Decl., Ex. 9 at 34-35; *see also* Lang Decl., Ex. 7 at 453:21-454:2 (“upon receiving
 6 authorization”). Digital Reg must pursue this theory, as it is accusing the Uplay PC login process
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED].

11 The plain language of the claim is “upon transmission,” which is expressly distinguished
 12 from “server authorization” in the claims of the ’059 patent. Wicker Decl., Ex. A at 14.¹⁷
 13 Moreover, the claims of the ’059 patent expressly distinguish between granting access “upon
 14 transmission” and server authorization. Dependent claim 26, which depends directly from claim
 15 16 and is not asserted, recites: “The method of claim 16, ***further comprising*** the step of ***receiving***
 16 ***an access granting message*** at the one or more successive computers.” The ’059 specification
 17 confirms that a “transmission” is an entirely different concept from “receiving an access granting

18 ¹⁶ Claim 16 of the ’059 patent recites, in part, “upon transmission of an ***authorized user***
 19 ***identifier*** to a network address other than a network address of the sending computer, access is
 20 granted to at least a portion of the electronic data.” Digital Reg contends that the claimed
 21 “authorized user identifier” is the same as the claimed “notification information.” However, the
 22 patent claims distinguish between the two. *Compare* claim 27 with claim 16. Given that claim 27
 23 contemplates granting access ***both*** (1) “upon transmission of an authorized user identifier,” ***and***
 24 (2) “also based in part on the result of a transmission of notification information,” the “authorized
 25 user identifier” cannot be synonymous with “notification information” as Digital Reg claims.

26 Instead, the ’059 specification explains that an “identifier” of an “authorized user” is
 27 information used to verify that the sender is authorized to create electronic data. Lang Decl., Ex. 2
 28 [’059 patent] at 2:42-45; *see also id.* at 6:26-31 (referring to “identifiers corresponding to
 29 authorized envelope creators”). Thus, the term “authorized user identifier” should be construed as
 30 “information used to verify that the sender is authorized to create electronic data.” Digital Reg has
 31 offered no opinion, and there is no evidence to support a finding of infringement under Ubisoft’s
 32 proposed construction, and summary judgment is warranted in favor of Ubisoft.

33 ¹⁷ Digital Reg’s validity expert, Dr. Arthur Keller, agreed that granting access “upon
 34 transmission” does not mean granting access based on “***receipt of a reply***” (*i.e.*, server
 35 authorization). Lang Decl., Ex. 13 at p. 64 (emphasis original).

1 message": "If, however, the attempted transmission succeeds (225) or an access granting message
 2 136 is received, the notification instructions 110 can store (230) data indicating successful access."
 3 Lang Decl., Ex. 2 at 8:52-55; *see also id.* at 7:59-64, 6:13-23.

4 Because granting access "upon transmission" means exactly what it says – and expressly
 5 does not mean granting access after server authorization as is required for Digital Reg's
 6 infringement theory – Ubisoft is entitled to summary judgment.

7 **IX. U.S. PATENT NOS. 7,127,515, 7,272,655, and 7,562,150**

8 **A. "based on the results of the attempt to transmit"**

9 Claim Term	10 Ubisoft's Construction	11 Plaintiff's Construction
12 "based on the results of the attempt to 13 transmit" ('655 claim 1, '150 claim 1)	14 based on whether or not 15 notification information is sent	16 No construction necessary

17 As described above in Section VIII.A, Defendants' construction should be adopted in view
 18 of the claims, specification and prosecution history. Digital Reg has offered no opinion and there
 19 is no evidence to support a finding of infringement of the '655 or '150 Patents by Ubisoft under
 20 Defendants' proposed construction. Accordingly, Ubisoft is entitled to summary judgment.

21 **X. DIGITAL REG'S CLAIMS AGAINST UBISOFT FOR SALES MADE BY VALVE
22 ARE BARRED.**

23 Sales of Ubisoft games made by Valve through its Steam Platform are expressly licensed
 24 pursuant to a Settlement Agreement between Digital Reg and Valve, previously a defendant in this
 25 action. Ninety percent (90%) of Ubisoft's accused games sales are through the Steam Platform.

26
 27
 28

1 [REDACTED]
 2 [REDACTED] Furthermore, from a factual standpoint, the
 3 conclusion that sales through the Steam Platform are made “using” the Steam Platform is both
 4 tautological and uncontrovertable – a game cannot be sold through the Steam Platform without
 5 “using” the Steam Platform. As a consequence, all such sales through the Steam Platform,
 6 including sales of Ubisoft games, are licensed and immune from suit.¹⁸ Accordingly, summary
 7 judgment should be granted to Ubisoft as to sales made through Steam as those claims are already
 8 settled, licensed, and released.

9 **XI. CONCLUSION**

10 For the foregoing reasons, Defendants Adobe, Symantec, and Ubisoft respectfully request
 11 that the Court grant summary judgment of noninfringement for all Asserted Claims of the asserted
 12 patents their favor.

13 Dated: April 21, 2014

Respectfully submitted,

14 WILSON SONSINI GOODRICH & ROSATI
 15 Professional Corporation

16

17

By: _____ /s/ *Ryan R. Smith*
 Ryan R. Smith

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Attorneys for Defendant
 SYMANTEC CORPORATION

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21

Dated: April 21, 2014

WEIL, GOTSHAL & MANGES LLP

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By: _____ /s/ *Edward R. Reines*
 Edward R. Reines

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25

Attorneys for Defendant
 ADOBE SYSTEMS INCORPORATED

18 In addition to the plain application of the Digital Reg/Valve agreement, Digital Reg’s effort
 26 to recover from both Valve and Ubisoft for the same game sales is fundamentally unfair and, not
 27 surprisingly, is foreclosed by the doctrine of patent exhaustion. *See, e.g., PNY Technologies, Inc.*
v. SanDisk Corp., C-11-04689 YGR, 2012 WL 1380271, at *5 (N.D. Cal. Apr. 20, 2012); *see also*
Freescale Semiconductor, Inc. v. ChipMOS Tech., Inc., 5:09-CV-3689-JF, 2011 WL 4014466, at
 28 *3 (N.D. Cal. Sept. 8, 2011).

1 Dated: April 21, 2014

ERISE IP, P.A.

2

3

By: _____ /s/ *Michelle L. Marriott*
4 Michelle L. Marriott

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6 Attorneys for Defendant
7 UBISOFT, INC.

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ATTESTATION

2 I, Ryan R. Smith, am the ECF User whose identification and password are being used to
3 file Defendants' Motion for Summary Judgment and Responsive Claim Construction. In
4 compliance with General Order No. 45, section X(B), and Local Rule 5.1(i)(3), I hereby attest that
5 Edward R. Reines of Weil, Gotshal & Manges LLP, on behalf of Adobe Systems Incorporated and
6 Michelle L. Marriott of Erise IP, P.A., on behalf of Ubisoft, Inc., have concurred in this filing.

8 || Dated: April 21, 2014

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____ /s/ Ryan R. Smith
Ryan R. Smith

Attorneys for Defendant
SYMANTEC CORPORATION